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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 307

EITEL-McCULLOUGH, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Tax Court is reported at 9 T. C. 1132. The opinion of the Court of Appeals (R. 37-38) is reported at 175 F. 2d 438.

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1949. (R. 39.) The petition for a writ of certiorari was filed on September 1, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Did the Court of Appeals act within its discretionary powers in dismissing the taxpayer's petition for review eight months after the expiration of the time for the filing of the record, as provided for by Rule 31, paragraph 2 of its Rules, where the taxpayer had failed to take steps to secure the filing of the record on review, and no valid excuse for such failure was shown?

RULES INVOLVED

The pertinent rules are set forth in the Appendix, *infra,* pp. 7-8.

STATEMENT

On December 17, 1947, the Tax Court handed down its opinion in this case (reported in 9 T. C. 1132). Taxpayer filed a motion to vacate the opinion and decision, which was denied by the Tax Court on January 16, 1948. A second motion for reopening and reconsideration of the case was filed, and, after argument, the Tax Court on April 12, 1948, denied that motion. (R. 2-3.) On May 14, 1948, the Tax Court rendered its decision wherein deficiencies in excess profits taxes for the years 1941 and 1942 were determined in the respective amounts of $115,803.01 and $190,922.79. (R. 3, 9.)

On August 13, 1948, taxpayer filed a petition for review of the Tax Court's decision in the Court of Appeals for the Ninth Circuit. On August 16, 1948, proof of service of a copy of the petition for review on counsel for the Commissioner of Internal Revenue was filed in the Tax Court. (R. 3, 9.)

On September 22, 1948, taxpayer filed with the Court of Appeals a motion for an extension of the time within which to complete the record on review from September 22, 1948, to and including November 21, 1948. (R. 3, 9-10, 22.) The motion was denied September 24, 1948. (R. 10.)

On May 11, 1949, the Commissioner filed with the Court of Appeals a motion to docket and for an order for the taxpayer to show cause why the petition for review should not be dismissed for failure to prosecute. (R. 2-5.) Notice of the motion was served on taxpayer (R. 1) and on May 23, 1949, taxpayer filed its statement in opposition to the Commissioner's motion (R. 8-21). On May 27, 1949, oral arguments of counsel were heard by three judges of the Court of Appeals, and on June 3, 1949, the Court granted the Commissioner's motion and ordered the petition dismissed. (R. 35, 37-38.)

ARGUMENT

The dismissal of the taxpayer's petition for review by the court below on the ground that taxpayer had shown no valid excuse for failing to file a record in compliance with the court's rules was entirely proper. The case is confined to its own peculiar facts and presents no question warranting review by this Court.[1]

Paragraph 2 of Rule 31 of the Court of Appeals for the Ninth Circuit, Appendix, *infra*, p. 8, pro-

[1] The merits of the case, to which a large portion of the petition for certiorari is devoted, were of course not considered by the court below, since there was no record before the court.

vides that the clerk of the Tax Court within forty days from the filing of the petition shall transmit a typewritten copy of the record on review to the clerk of the Court of Appeals, prepared in accordance with the provisions of Rule 75 or 76 of the Rules of Civil Procedure. Here the record was not filed within the forty days, and taxpayer made no attempt to secure an extension of time until the fortieth day, when, without notice to the Commissioner, taxpayer's attorney filed with the Court of Appeals a motion requesting an extension of sixty days. The motion was denied and taxpayer made no further effort to perfect its appeal during the eight months that followed.

Rule 75(a), Federal Rules of Civil Procedure, Appendix, *infra,* p. 7, requires the appellant (petitioner) promptly to serve on appellee (respondent) and file a designation of the portions of the record, proceedings and evidence to be contained in the record on appeal. Taxpayer wholly failed to comply with this rule. Neither promptly nor at any time did it serve upon the Commissioner or file in the Tax Court a designation. No record has been filed with the Court of Appeals. Cf. *McBee* v. *United States,* 126 F. 2d 238 (C. A. 10th). While the filing and docketing of the record is not jurisdictional, it is clear that the rules are expected to be followed, and that unless reasons satisfactory to the court are advanced as a basis for special relief from their provisions, the appeal may be dismissed. *Markham* v. *Kallimanis,* 151 F. 2d 145,

146 (C. A. 9th), certiorari denied, 327 U. S. 788; *In re Plankinton Bldg. Co.,* 133 F. 2d 900, 901 (C. A. 7th); *In re Gammill,* 129 F. 2d 501, 502 (C. A. 7th); *United States* v. *Stanton,* 172 F. 2d 642, 643 (C. A. 9th); *United States* v. *Gallagher,* 151 F. 2d 556, 559 (C. A. 9th).

The reason for the delay advanced by taxpayer's attorney in his motion for enlargement of time within which to file the record (R. 22) was that the attorney had not had time during the forty-day period to discuss the appeal with his clients. A further reason for taxpayer's neglect is set out in the "Affidavit of Attorney for Petitioner in Support of Opposition to Respondent's Motion to Docket and Dismiss for Failure to Prosecute Petition for Review" (R. 14, 16-17), viz.: These tactics were adopted in the hope that before the case was closed the Tax Court could be persuaded to amend its rules pertaining to review of cases under Section 732(d) of the Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 732). (R. 29, 31-34.) That these reasons do not constitute the "excusable neglect" [2] for which an appellate court may overlook irregularities in perfecting an appeal is, as the Court of Appeals found (R. 38), abundantly clear, and other Courts of Appeals have specifically held that reasons of this character will not be accepted. See *Maghan* v. *Young,* 154 F. 2d 13 (C. A. D. C.),

[2] *Beecher* v. *Federal Land Bank of Spokane, Wash.,* 146 F. 2d 934, 939 (C.A. 9th); *Morrow* v. *Wood,* 126 F. 2d 1021, 1022 (C.A. 5th).

and *Markham* v. *Kallimanis,* 151 F. 2d 145 (C. A. 9th, certiorari denied, 327 U. S. 788.

The rules of procedure were intended to expedite and simplify disposition of cases. Ample provision is made in the rules to relieve against hardship and excusable neglect. Where, as here, there is both inexcusable neglect and long delay, the appellate court is justified in dismissing the appeal. *United States* v. *Schlotfeldt,* 123 F. 2d 109, 111 (C. A. 7th).

CONCLUSION

The dismissal by the lower court is correct. The case presents no important or general question, and there is no conflict with decisions of any other Courts of Appeals. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.
THERON LAMAR CAUDLE,
Assistant Attorney General,
ELLIS N. SLACK,
LEE A. JACKSON,
VIRGINIA H. ADAMS,
Special Assistants to the Attorney General.

OCTOBER 1949.

APPENDIX

Federal Rules of Civil Procedure, as amended January 2, 1947:

RULE 75. RECORD ON APPEAL TO A CIRCUIT COURT OF APPEALS.

(a) *Designation of Contents of Record on Appeal.* Promptly after an appeal to a circuit court of appeals is taken, the appellant shall serve upon the appellee and file with the district court a designation of the portions of the record, proceedings, and evidence to be contained in the record on appeal, * * *.

(b) *Transcript.* If there be designated for inclusion any evidence or proceeding at a trial or hearing which was stenographically reported, the appellant shall file with his designation a copy of the reporter's transcript of the evidence or proceedings included in his designation. * * *

* * * * *

(d) *Statement of Points.* No assignment of errors is necessary. If the appellant does not designate for inclusion the complete record and all the proceedings and evidence in the action, he shall serve with his designation a concise statement of the points on which he intends to rely on the appeal.

* * * * *

(f) *Stipulation as to Record.* Instead of serving designations as above provided, the parties by written stipulation filed with the

clerk of the district court may designate the parts of the record, proceedings, and evidence to be included in the record on appeal.

* * * * *

Rules of the United States Court of Appeals for the Ninth Circuit:

RULE 31. THE TAX COURT OF THE UNITED STATES.

2. The clerk of The Tax Court within forty days from the filing of the petition shall transmit a typewritten copy of the record on review to the clerk of this court, prepared in accordance with the provisions of Rule 75 or 76 of the Rules of Civil Procedure for the District Court of the United States.

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